

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL-]

RIN 2060- AN13

Protection of Stratospheric Ozone: Process for Exempting Critical Uses of Methyl Bromide for the 2005 Supplemental Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action EPA is authorizing the use of 610,665 kilograms of methyl bromide for supplemental critical uses in 2005 through the allocation of additional critical stock allowances (CSAs). This allocation supplements the critical use allowances (CUAs) and CSAs previously allocated for 2005, as published in the Federal Register on December 23, 2004 (69 FR 76982). Further, EPA is amending the existing list of exempted critical uses to add uses authorized by the Parties to the Montreal Protocol at their Sixteenth Meeting in November 2004. Today's action is authorized under the Clean Air Act (CAA or the Act) and is in accordance with the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol).

EFFECTIVE DATE: This final rule is effective on **[insert date of December 9, 2005]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR-2004-0506. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available,

only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Hodayah Finman, U.S. Environmental Protection Agency, Office of Air and Radiation, Stratospheric Protection Division (6205J), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460; telephone number: (202) 343-9246; fax number: (202) 343-2338; finman.hodayah@epa.gov. You may also visit the EPA's Ozone Depletion web site at www.epa.gov/ozone for further information about EPA's Stratospheric Ozone Protection regulations, the science of ozone layer depletion, and other related topics.

SUPPLEMENTARY INFORMATION:

This action concerns regulation of methyl bromide, a class I, Group VI ozone-depleting substance. Under the Clean Air Act, as amended in 1990 and 1998, methyl bromide production and consumption (defined as production plus imports minus exports) were phased out on January 1, 2005, apart from certain exemptions, including the critical use exemption which is the subject of today's rule. In a final rule published December 23, 2004 (69 FR 76982), EPA established the framework for the critical use exemption; set forth a list of approved critical uses for 2005; and specified the amount of methyl bromide that could be supplied in 2005 from stocks and new production or import to meet approved critical uses. As part of that rule, EPA issued critical use

allowances (CUAs) for new production and import and critical stock allowances (CSAs) for sale of methyl bromide stocks.

On August 30, 2005, EPA issued a direct final rule and parallel proposal to add additional uses of methyl bromide to the list of approved critical uses and to issue additional CSAs for the 2005 control period (70 FR 51270). These actions were taken to reflect a decision by the Parties to the Montreal Protocol at their sixteenth meeting to authorize supplemental critical uses and amounts. Due to the receipt of adverse comment, EPA withdrew the direct final rule, and it did not go into effect (70 FR 60443). Today EPA is taking final action based on the August 30, 2005 proposal. Today's final action is in accordance with Decision XVI/2 taken by the Montreal Protocol Parties at their November 2004 meeting and with prior decisions of the parties on critical uses.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C., Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the Federal Register. Today's final rule is issued under section 307(d) of the CAA, which states: "The provisions of section 553 through 557... of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." CAA section 307(d)(1). Thus, section 553(d) of the APA does not apply to this rule. EPA nevertheless is acting consistently with the policies underlying APA section 553(d) in making this rule effective on **[insert date of December 9, 2005]**. APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Today's final rule grants an exemption from the phaseout of methyl bromide. Because the allowances issued through this action will expire at the end of 2005, EPA is making this rule effective immediately to provide allowance holders an opportunity to expend the allowances before they expire.

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I. Background on The Montreal Protocol and the Critical Use Exemption

The Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol) is an international agreement aimed at reducing and eliminating the production and consumption of

stratospheric ozone depleting substances (ODS).¹ The elimination of production and consumption of ODSs is accomplished through adherence to phase-out schedules for specific class I ODSs², including: chlorofluorocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform. The Clean Air Act, as amended in 1990 and 1998, requires EPA to promulgate regulations implementing the Protocol's phaseout schedules in the United States. Those regulations are codified at 40 CFR Part 82. As of January 1, 1996, production and import of most class I ODSs were phased out in developed countries, including the United States. Production and import of methyl bromide were phased out in those countries as of January 1, 2005. However, the Protocol provides exemptions that allow for the continued import and/or production of ODSs, including methyl bromide.

Methyl bromide was added to the Protocol as an ODS in 1992 through the Copenhagen amendment to the Protocol. The Parties agreed that each industrialized country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing a freeze in the level of methyl bromide production and consumption for industrialized countries. EPA published a final rule in the Federal Register on December 10, 1993 (58 FR 65018), listing methyl bromide as a class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 level, and, in Section 82.7 of the rule, setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until the year 2001, when the complete phaseout would occur (58 FR 65018).

¹ "Consumption" is defined as the amount of a substance produced in the United States, plus the amount imported into the United States, minus the amount exported to Parties to the Montreal Protocol (see Section 601(6) of the Clean Air Act). Stockpiles of class I ODSs produced or imported prior to the 1996 phase out may be used for purposes not expressly banned at 40 CFR part 82.

² Class I ozone depleting substances are listed at 40 CFR Part 82 subpart A, appendix A.

The 2001 phaseout date was established in response to a petition filed in 1991 under sections 602 (c)(3) and 606 (b) of the Clean Air Act Amendments (CAAA) of 1990, requesting that EPA list methyl bromide as a class I substance and phase out its production and consumption. This date was consistent with section 602(d) of the CAAA of 1990, which for newly-listed class I ODSs provides that “no extension [of the phaseout schedule in section 604] under this subsection may extend the date for termination of production of any class I substance to a date more than 7 years after January 1 of the year after the year in which the substance is added to the list of class I substances.” EPA based its action on scientific assessments and actions by the Parties to the Montreal Protocol at their 1992 Meeting in Copenhagen to freeze the level of methyl bromide production and consumption for industrialized countries.

At their 1995 meeting, the Parties made adjustments to the methyl bromide control measures and agreed to reduction steps and a 2010 phaseout date for industrialized countries along with certain allowable exemptions such as the critical use exemption. At the time the Parties adopted this phasedown schedule for methyl bromide, the U.S. continued to have a 2001 phaseout date in accordance with the language of the 1990 CAAA. At their 1997 meeting, the Parties agreed to further adjustments to the phaseout schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phaseout for industrialized countries. In October 1998, the U.S. Congress amended the CAA to prohibit the termination of production of methyl bromide prior to January 1, 2005; to require EPA to bring the U.S. phaseout of methyl bromide in line with the schedule specified under the Protocol; and to authorize EPA to provide exemptions for critical uses. These amendments were contained in Section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Pub. L. 105-277, October 21, 1998) and were codified in Section 604 of the CAA, 42 U.S.C.

7671c. On November 28, 2000, EPA issued regulations to amend the phaseout schedule for methyl bromide and extend the complete phaseout of production and consumption to 2005 (65 FR 70795).

On December 23, 2004 (69 FR 76982), EPA published a final rule in the Federal Register that established the framework for the critical use exemption, set forth a list of approved critical uses for 2005, and specified the amount of methyl bromide that could be supplied in 2005 from available stocks and new production or import to meet approved critical uses. Today, EPA is authorizing sale of additional amounts of methyl bromide from inventory for critical uses in the 2005 control period. In addition, EPA is amending the existing list of approved critical uses to add uses authorized by the Parties at their sixteenth meeting in Prague under Decision XVI/2.

In accordance with Article 2H(5), the Parties have issued several Decisions pertaining to the critical use exemption. These include Decision IX/6, which set forth criteria for review of proposed critical uses; Decision Ex. I/3, which addressed agreed critical uses, critical-use exemption levels, and allowable levels of new production and consumption for critical uses in 2005; and Decision XVI/2, which, in part, supplements the critical use categories and exemption levels discussed in Decision Ex. I/3.

For a discussion of the relationship between the relevant provisions of the CAA, as amended in 1990 and 1998, and Article 2H of the Protocol, and the extent to which EPA takes into account Decisions of the Parties that interpret Article 2H, refer to the December 23, 2004, final rule (69 FR 76984-76985). Briefly, EPA regards certain provisions of Decisions IX/6, Ex. I/3, and XVI/2 as subsequent consensus agreements of the Parties that address the interpretation and application of the critical use provision in Article 2H(5) of the Protocol. In today's action,

EPA is following the terms of these Decisions. This will ensure consistency with the Montreal Protocol, 42 U.S.C. 7671c(d)(6).

Because it is a pesticide, methyl bromide is also regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and other statutes and regulatory authority and by States under their own statutes and regulatory authority. Under FIFRA, methyl bromide is a restricted use pesticide and therefore subject to certain Federal and State requirements governing its sale, distribution, and use. Nothing in this final rule implementing the Clean Air Act is intended to derogate from provisions in any other Federal, State, or Local laws or regulations governing actions including, but not limited to, the sale, distribution, transfer, and use of methyl bromide. All entities that would be affected by provisions of this final rule must continue to comply with FIFRA and other pertinent statutory and regulatory requirements for pesticides (including, but not limited to, requirements pertaining to restricted use pesticides) when importing, exporting, acquiring, selling, distributing, transferring, or using methyl bromide for critical uses. The regulations in today's action are intended only to implement the critical use exemption under the CAA.

II. Background on the Critical Use Exemption Process

Starting in 2002, EPA began informing applicants of the availability of an application process for a critical use exemption to the methyl bromide phaseout. The Agency published a notice in the Federal Register (68 FR 24737) announcing the deadline to apply, and directing applicants to announcements posted on EPA's methyl bromide website at www.epa.gov/ozone/mbr. On May 8, 2003 (68 FR 24737), EPA published a notice in the

Federal Register announcing the August 6, 2003, deadline for applications for 2005. Applicants were told they may apply as individuals or as part of a group of users (a “consortium”) who face the same limiting critical conditions (i.e. specific conditions which establish a critical need for methyl bromide). This process has been repeated annually since 2002.

In response to the yearly requests for critical use exemption applications published in the Federal Register, applicants have provided information supporting their position that they have no technically and economically feasible alternatives to methyl bromide available to them. Applicants for the exemption have submitted information on their use of methyl bromide, on research into the use of alternatives to methyl bromide, on efforts to minimize use of methyl bromide and efforts to reduce emissions and on the specific technical and economic research results of testing alternatives to methyl bromide.

The CAA, as amended in 1990 and 1998, allows the Agency to create an exemption for critical uses to the extent consistent with the Protocol. The critical use exemption process is designed to meet the needs of methyl bromide users who do not have technically and economically feasible alternatives available. EPA’s December 23, 2004, final rule describing the operational framework for the critical use exemption (69 FR 76982) established the majority of critical uses for the 2005 calendar year. In today’s action, EPA is establishing supplemental critical uses available in the U.S. for the 2005 calendar year.

A detailed explanation of the development of the nomination, including the criteria used by expert reviewers, is available in a memo titled “2003 Nomination Process: Development of 2003 Nomination for a Critical Use Exemption for Methyl Bromide from the United States of America” on E-Docket OAR-2003-0230 (document 104) and E-Docket OAR-2004-0506. The process described in this memo applies equally to the 2004 nomination process. The 2004

nomination included the supplemental request for 2005 critical uses which are the subject of today's action.

All critical use exemption applications, including those described in the supplemental request for 2005, underwent a rigorous review by highly qualified technical experts. The CUE applications (except to the extent claimed confidential) are available on E-Docket OAR-2004-0506. Data from the applications served as the basis for the nomination and was augmented by multiple other sources, including but not limited to the National Agricultural Statistics Service of the U.S. Department of Agriculture, the State of California Department of Pesticide Regulation, peer-reviewed articles, and crop budgets.

After submission of the first U.S. Nomination for a Critical Use Exemption for Methyl Bromide, in February 2003, the U.S. government decided to request additional critical uses for 2005 in the second nomination sent to the Ozone Secretariat in February 2004. The U.S. decided to do so, in part, because certain sectors were not able to apply for an exemption in time for the 2003 nomination.

With the second nomination submitted to the Ozone Secretariat in February 2004, most of which referred to uses for the 2006 control period, the U.S. government included some limited supplemental requests for 2005. These requests may be found in Appendix B of each chapter of the U.S. nomination and are available on E-docket OAR-2004-0506 and http://www.epa.gov/mbr/nomination_2006.html.

The U.S. originally nominated the following applicants for supplemental 2005 consideration: California Cut Flower Commission, National Country Ham Association, Wayco Ham Company, California Date Commission, California Strawberry Commission, California Tomato Commission, National Pest Management Association, Michigan Pepper Growers,

Michigan Eggplant Growers, Burley & Dark Tobacco USA - transplant trays, Burley & Dark Tobacco USA - field grown, Virginia Tobacco Growers - transplant trays, Michigan Herbaceous Perennials, Ozark Country Hams, Nahunta Pork Center and, American Association of Meat Processors. Subsequent to the submission of the supplemental nomination, all of the tobacco applicants withdrew their CUE requests for the 2005 control period and beyond. In addition, the U.S. requested correction to the amounts for two other sectors.

The Ozone Secretariat referred the U.S. nomination to the Technical and Economic Assessment Panel (TEAP) and its subsidiary body, the Methyl Bromide Technical Options Committee (MBTOC) for review. The TEAP and the MBTOC reviewed the nominations, asked clarifying questions of the U.S. Government, and provided recommendations on the requested exemptions to the Parties to the Montreal Protocol for their consideration at the Sixteenth Meeting of the Parties.

In June 2004, the MBTOC sent questions to the U.S. Government concerning technical and economic issues in the nomination. These questions, as well as the U.S. Government's response, can be accessed on E-docket OAR-2004-0506. The U.S. government's response was transmitted on August 13, 2005. When responding to these questions, the U.S. Government explained that critical use exemptions were being sought only in areas with moderate-to-severe pest pressure, where the use of alternatives would result in substantial yield losses, or where regulatory restrictions or geophysical conditions prohibit the adoption of alternatives. There were questions on all of the sectors described in today's action; however, many questions focused on alternatives in the overall sector instead of the specific supplemental requested amount.

In October, 2004, the MBTOC and the TEAP issued a final report on critical use nominations for methyl bromide. This report, issued by the United Nations Environment

Programme (UNEP) and TEAP, is titled “Critical Use Nominations for Methyl Bromide: Final Report” and can be accessed at <http://www.unep.ch/ozone/teap/Reports/MBTOC> or on E-docket OAR-2004-0506. In Annex I of the report, the advisory bodies recommended an additional 584,093 kilograms of methyl bromide for U.S. critical uses in 2005. The additional kilograms were recommended for the following sectors: dried fruit and nuts (dates); dry commodities/structures (cocoa beans); dry commodities/structures (processed foods, herbs and spices, dried milk and cheese processing facilities); eggplant; ornamentals; peppers; smokehouse ham; strawberry fruit; and tomatoes.

Based on the recommendations from the advisory bodies, the Parties authorized 610,655 kilograms of methyl bromide for 2005 supplemental uses in the U.S., in Decision XVI/2. The authorization adds 26,562 kilograms to the TEAP recommendation by restoring the full amount of the U.S. request for dry commodities/structures (cocoa beans). The Parties approved the above-mentioned uses referenced in the MBTOC/TEAP report.

More information on each of the nominated sectors, including calculations of production losses and other technical data, can be found in the annual nomination on E-docket OAR-2004-0506.

III. Today’s Action

With today’s action, EPA has determined that an additional 610,665 kg. of methyl bromide are required to satisfy critical uses for the 2005. EPA is allocating an additional 610,665 critical stock allowances (CSAs) to companies that hold pre-phaseout inventories of methyl bromide. These allowances, consistent with the CUE framework rule published on

December 23, 2004, allow the holder to sell pre-phaseout inventories of methyl bromide to critical uses. In addition, with today's action, EPA is amending the list of approved critical uses found at 40 CFR 82 appendix L to include new critical uses authorized by the Parties at their sixteenth meeting in November 2004.

Consistent with the framework for the critical use exemption established in the December rulemaking, each CSA is equivalent to one kilogram of methyl bromide and all allowances expire at the end of the control period. Therefore, the supplemental allowances allocated in today's rule expire at the end of 2005.

The methodology for calculating the amount of CSAs allocated to each entity is explained in a memorandum titled "CSA Description Memo," available on E-docket OAR-2004-0506. In summary, EPA has used its authority under Section 114 of the CAA to require that certain regulated entities provide the Agency with information about their holdings of methyl bromide.

EPA is allocating CSAs in this rule on a pro-rated basis, calculated as an average of the entities' December 31, 2003, and August 25, 2004, holdings of pre-phaseout methyl bromide. This same baseline was also used to calculate CSAs in the framework rule (69 FR 76982). However, EPA notes that due to a slight baseline reporting error, one entity was granted fewer CSAs in the December 2004 framework rule than it would have been allocated had this reporting error not occurred because its relative share of the entire stockpile was underreported. The entity has since clarified the data submitted to EPA. Based on the new data, EPA was able to correctly apportion the ownership of the total stockpile to each company to reflect actual holdings of methyl bromide as of an average of the December 31, 2003, and August 25, 2004, data. Therefore, EPA is granting this entity sufficient CSAs from the 610,665-kg supplemental amount

to make up the quantity of CSAs it would have received had the data been reported correctly, and is distributing the remaining allowances using the baselines as previously established but reflecting the correct percentage ownership of the total stockpile.

EPA is allocating CSAs to the following companies for the 2005 supplemental authorized amounts of critical use methyl bromide.

Company

Albemarle	J.C. Ehrlich Co.
Ameribrom, Inc.	Pacific Ag
Bill Clark Pest Control, Inc.	Pest Fog Sales Corporation
Blair Soil Fumigation	ProSource One
Burnside Services, Inc.	Reddick Fumigants
Cardinal Professional Products	Royster-Clark, Inc.
Carolina Eastern, Inc.	Southern State Cooperative, Inc.

Degesch America, Inc.	Trical, Inc.
Dodson Bros.	Trident Agricultural Products
Great Lakes Chemical Corporation	UAP Southeast (NC)
Harvey Fertilizer and Gas	UAP Southeast (SC)
Helena Chemical Co.	Univar
Hendrix and Dail	Vanguard Fumigation Co.
Hy Yield Bromine	Western Fumigation
Industrial Fumigation Company	TOTAL 610,665 KILOGRAMS

EPA has determined that the individual holdings of methyl bromide stocks are Confidential Business Information (CBI). Therefore, individual baseline data and individual company allocations of CSAs are only available in the confidential portion of the docket for this rulemaking and do not appear in this Federal Register document. EPA has determined that the aggregate stock information is not CBI but is currently withholding that information due to the filing of complaints seeking to enjoin the Agency from its release.

EPA received comments on the previously published direct final and concurrent proposed rule from four entities. EPA received one comment requesting the Agency to finalize the rule before October 31, 2005, because even though the supplemental critical uses and amounts will not be available until close to the end of the control period, it is better to have them late in the year than not at all. EPA understands the concerns of the regulated community and is making every effort to publish the final rule expeditiously.

One commenter suggested that EPA must account for language in Decision Ex. II/1 in making critical uses available in 2005. Decision Ex. II/1 refers to critical uses for the year 2006. EPA addressed language in the Decision the notice of proposed rulemaking for 2006 critical uses (70 FR 62030), published on October 27, 2005.

This commenter further questioned the process the Agency has established to make critical uses available in the U.S. and contested EPA's interpretation of decisions related to the critical use exemption. The commenter referred repeatedly to Decision IX/6, paragraph 1(b), which states in part that "production and consumption, if any, of methyl bromide for critical uses should be permitted only if ...[a]ll technically and economically feasible steps have been taken to minimize the critical use and any associated emissions." The commenter referred to additional Decisions in stating what it believes EPA should consider "in deciding how much new production and importation to allow after 2004." EPA's interpretation of the cited Decisions differs from the commenter's. However, EPA is not responding in detail to these comments because they are not relevant to today's action. EPA is not authorizing any additional production or import in this final rule; it is only authorizing the sale of additional amounts of methyl bromide from pre-phaseout inventories.

In addition, EPA has already responded to many of the points raised by the commenter. In particular, the commenter does not agree with EPA's accounting of stocks, evaluation of the amount of methyl bromide needed to meet critical uses, levels of critical use, and the ability of users to access non-critical-use methyl bromide for non-critical uses. The commenter raised substantially the same issues in its comments on the CUE framework rule proposed on August 25, 2004, and finalized on December 23, 2004 (69 FR 76982). EPA addressed these comments as part of that rulemaking and refers the public to E-docket OAR-2003-0230 to view specific responses to those comments contained in the response to comment document for the framework rule. These issues are further addressed in briefs filed in *NRDC v. EPA*, D.C. Cir No. 04-1438, which have also been placed in E-docket OAR-2004-0506.

The supplemental critical use amount that we are authorizing today, in the form of additional critical stock allowances, is based on the information described in this notice and in the August 30, 2005, notice of proposed rulemaking. This includes information received from applicants as well as other data sources noted above. The approach to assessing critical need discussed in the December 23, 2004 framework rule and in the response to comments document for the framework rule was used for this supplemental amount. Those documents also explain the limitations of the 2003 use estimate to which the commenter refers.

The commenter further stated that EPA should not establish additional uses as "critical" because the Agency did not find, pursuant to Decision IX/6, paragraph 1(a), that the lack of methyl bromide for those uses "would result in a significant market disruption." However, the Agency did make such a finding, as noted in the preamble to the direct final rule on August 30, 2005 (70 FR 51277). In addition, EPA's interpretation of the phrase "significant market disruption" appears in the memorandum entitled "2003 Nomination Process: Development of

2003 Nomination for a Critical use Exemption for Methyl Bromide from the United States of America” which appears in docket OAR-2004-0506 and was referenced at 70 FR 51274. As previously noted, that memorandum applied equally to the supplemental request for 2005. Specific discussions of the economic feasibility of alternatives for each of the uses addressed in today’s action appear in the corresponding chapters of the 2004 U.S. Nomination, available on E-docket OAR-2004-0506.

The commenter states that a “significant market disruption” refers to “a decrease or delay in supply or increase in price of a commodity produced with methyl bromide.” EPA understands the commenter to suggest that market disruption is a disruption where consumers are unable to obtain a commodity, are delayed in obtaining a commodity, or must pay more for that commodity. EPA does not disagree with the commenter that the outcome described by the commenter could constitute a significant market disruption. However, in the aforementioned memorandum available in E-docket OAR-2004-0506, EPA outlined additional circumstances which could result in a significant market disruption. EPA stated that “markets are partially defined by the interaction between supply and demand, which determines the price and quantity of a good traded in a market. EPA’s position is that a disruption to either side of a commodity market, demand or supply, would result in market disruption.” Therefore, a significant market disruption could be experienced on the demand side, as explained by the commenter, or on the supply side, should agricultural producers be economically harmed as a result of the loss of methyl bromide. For example, if the loss of methyl bromide in strawberry production would mean that no strawberry farmers in the U.S. would be able to continue to produce this crop, the EPA would likely find that such a situation constitutes a significant market disruption even if consumers could still buy supplies of strawberries from Central and South America.

Lastly, the commenter has filed a Freedom of Information Act (FOIA) request as part of its comment submission for data on 2004 levels of methyl bromide use. EPA is responding to this FOIA request through the standard Agency process.

As described in the direct final rule (70 FR 51276), EPA is finalizing an amendment to the reporting and recordkeeping requirements at 40 CFR 82.13 to require that entities report the amount of pre-phaseout methyl bromide inventory, held for sale or transfer to another entity, to the Agency on an annual basis. Entities will be required to differentiate between the amounts owned by them and those owned by other entities. Pre-phaseout refers to inventories of methyl bromide produced or imported prior to January 1, 2005. This additional requirement will allow EPA to track the drawdown of pre-phaseout inventories. The Agency did not receive any comments on this amendment to the reporting requirements.

For the reasons stated in the direct final rule, EPA is authorizing the sale of additional amounts of methyl bromide for critical uses from pre-phaseout inventories and is not authorizing new production or import. In the December 23, 2004, framework rule, EPA allocated 1,283,214 CSAs to satisfy critical uses. Consistent with the framework established in the framework rule and with Decisions Ex. I/3 and XVI/2, EPA is allocating an additional 610,665 CSAs in today's rule.

In Decision XVI/2, taken in November 2004, the Parties to the Protocol agreed to add the following uses to the list of approved critical uses for 2005: dried fruit and nuts; eggplant, field; peppers, field; tomato, field; dry commodities - structures (cocoa); dry commodities - processed foods, herbs, spices, dried milk; ornamentals; smokehouse ham; strawberry fruit. Some of these uses, such as strawberry fruit, were previously authorized by the Parties in Decision Ex. I/3, however, in Decision XVI/2 the Parties allowed for new portions of the strawberry fruit industry

to qualify for the critical use exemption. Other uses, such as herbs, spices, and dried milk, are new categories of critical use altogether.

EPA has determined that the uses identified in Decision XVI/2 are critical uses and is amending Appendix L to 40 CFR Part 82 to reflect the new uses, locations of use, and limiting critical conditions. The August 30, 2005, Federal Register notice contained summaries of the technical and or economic basis for the Agency's proposed determination that these uses are critical uses. More extensive discussions of the technical and economic basis can be found in the U.S. Government's 2004 nomination and responses to questions from MBTOC. In instances where the Agency believes the circumstances of the use have changed - for example, the registration of a new alternative - EPA would also take such developments into account in developing a proposed determination on critical uses.

EPA solicited comments from the public on the proposed critical use determination and did not receive any comments that a change in circumstance has occurred in a particular critical use category. In addition, the Agency did not receive any comments on the technical and economic evaluation that led to EPA's critical use determination. Therefore, EPA does not have new information which leads the Agency to conclude that the proposed determination reached by the Agency in the August 30, 2005, Federal Register notice should be altered.

EPA did receive one comment that states that there are "no critical uses" for methyl bromide. The CAA does allow for critical uses and EPA has used the criteria in Decision IX/6 - which include such factors as the lack of technically and economically feasible alternatives - to assess whether a given use qualifies as critical. The Agency, through the nomination process, established that certain uses met these criteria. The commenter did not provide any technical

data to substantiate a claim that there are “no critical uses” based on the availability of alternatives, thus the Agency is not changing its proposed determination.

Another commenter stated that methyl bromide can cause acute health problems and that her family may be suffering from methyl bromide exposure. Statutory authority to address issues of exposure and health effects lies under FIFRA and other programs run by pesticide licensing agencies at the Federal, state, and local level. The commenter further states that there are alternatives to methyl bromide and that an exemption is therefore not necessary.

EPA does not dispute that there are alternatives to methyl bromide for many uses of this fumigant. However, in some cases the alternative may not be registered or otherwise available for use; in other instances, the alternative may not be technically feasible under certain circumstances; last, an alternative may not be economically feasible for certain uses. EPA conducts a detailed analysis of these and other factors to determine whether a particular use should be designated a critical use. The uses proposed by the agency in the August 30, 2005, notice are uses that EPA believes, based on extensive analysis, do not have feasible alternatives in the circumstances of the use. EPA solicited comments on the specific proposed uses and did not receive any information that would change this technical analysis.

Therefore, in today’s action, EPA is finalizing the proposed amendments to Appendix L of 40 CFR Part 82 and adding several new uses to the list of approved critical uses for 2005 as follows:

AMENDMENTS TO 40 CFR PART 82, SUBPART A, APPENDIX L

The following table shows the additions to Appendix L of 40 CFR Part 82, Subpart A

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Column A	Column B	Column C
Approved Critical Uses	Approved Critical User and Location of Use	Limiting Critical Conditions
PRE-PLANT USES		
Eggplant	Michigan growers	With a reasonable expectation that moderate to severe fungal pathogen infestation either already exists or could occur without methyl bromide fumigation
Ornamentals (Cut flowers)	California Cut Flower Commission and Florida growers	With a reasonable expectation that moderate to severe pest pressure either already exists or could occur without methyl bromide fumigation, or with reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
Peppers (field)	Michigan growers	With a reasonable expectation that moderate to severe fungal pathogen infestation either already exists or could

		occur without methyl bromide fumigation.
Strawberry fruit	California growers	With a reasonable expectation that one or more of the following limiting critical conditions already either exists or could occur without methyl bromide fumigation: moderate to severe black root rot or crown rot, moderate to severe yellow or purple nutsedge infestation, a prohibition of the use of 1,3-dichloropropene products because local township limits for this alternative have been reached, time to transition to an alternative, hilly terrain that prevents the distribution of alternative.
Tomatoes	California growers in San Diego and Ventura Counties	With a reasonable expectation that moderate to severe pest pressure either already exists or could occur or where alternatives are ineffective because of hilly terrain.
POST-HARVEST USES		

Food processing	Members of the National Pest Management Association associated with dry commodity structure fumigation (cocoa) and dry commodity fumigation (processed food, herbs, spices, and dried milk)	With reasonable expectation that one or more of the following limiting critical conditions exists: Older facilities that cannot be properly sealed to use an alternative to methyl bromide, or the presence of sensitive electronic equipment subject to corrosivity, or where heat treatment would cause rancidity to commodities, time to transition to an alternative.
Dried Fruit and Nuts (dates only)	Growers and packers who are members of the California Date Commission, whose facilities are located only in Riverside County.	With a reasonable expectation that one or more of the following limiting critical conditions exists: Rapid fumigation is required to meet a critical market window such as during the holiday season, rapid fumigation is required when a buyer provides short (2 days or less) notification for a purchase, or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.

Dry Cured Pork Products	(A) Members of the National Country Ham Association	Pork product facilities owned by companies that are members of the Association.
	(B) Members of the American Association of Meat Processors	Pork product facilities owned by companies that are members of the Association.
	(C) Nahunta Pork Center (North Carolina)	

Lastly, in today's rule EPA is finalizing a clarification to 40 CFR 82.4(p)(2) proposed in the August 30, 2005, notice (70 FR 51270). In the CUE rule published on December 23, 2004 (69 FR 76982), EPA created a prohibition as follows. Paragraph (p)(2)(vi) states that, with some exceptions: "No person who purchases critical use methyl bromide during the control period shall use that methyl bromide on a field or structure for which that person has used non-critical use methyl bromide for the same use (as defined in Columns A and B of Appendix L) in the same control period." However, EPA did not intend this prohibition to prevent end users who have been using non-critical use methyl bromide during the first part of 2005 from using critical use methyl bromide on the same field or structure for the same use if they became approved critical users as a result of this supplemental rulemaking. Such a result would deprive those end users of the benefit of the exemption solely as a result of the timing of the rule. Thus, EPA is adding the following exception to paragraph (p)(2)(vi): "or unless, subsequent to that person's use of the non-critical use methyl bromide, that person...(b) becomes an approved critical user as a result of rulemaking." EPA is also making a corresponding change to § 82.13, paragraph

(2)(dd), which describes the self-certification process for approved critical users: “...I am aware that any agricultural commodity within a treatment chamber, facility, or field I fumigate with critical use methyl bromide cannot subsequently be fumigated with non-critical use methyl bromide during the same control period, excepting a QPS treatment or a treatment for a different use...unless a local township cap limit now prevents me from using methyl bromide alternatives, or I have now become an approved critical user as a result of rulemaking.”

EPA received one comment on this clarification. The commenter stated that he did not support the approach outlined above because it would allow for “double dipping” and he was concerned that critical users would be allowed to use more methyl bromide than is set forth in Decisions Ex 1/3 and XVI/2. EPA disagrees with the commenter’s assumptions and notes that the comment inappropriately focuses on “users” as opposed to “uses.” Under the framework rule, EPA established a system where there are two types of use: critical uses and non-critical uses. A single entity may have both critical and non-critical uses. For example, a particular walnut producer may have some silos that require rapid fumigation (a limiting critical condition) and therefore have a critical need for methyl bromide, and other silos that do not require rapid fumigation and whose fumigation therefore does not qualify as a critical use. In addition, an entity may become subject to a prohibition on the use of methyl bromide alternatives due to the reaching of a local township limit, as provided in Appendix L, Column C. There would then be a critical need for methyl bromide later in the year that did not occur at the onset of the year. As a result, a use that was formerly non-critical may become critical. Because a single entity may have both non-critical and critical uses and because circumstances of use may change throughout the year causing the same site to either be critical or non-critical within the same control period, EPA created a framework that controls not the user but rather the individual use.

The commenter contends that if a user can have both non-critical and critical uses that more methyl bromide could be used in the U.S. than is set forth in the decisions on critical uses. However, the critical use exemption level contained in the decisions applies to critical uses only; use of methyl bromide for non-critical uses does not count against this cap. In addition, there is no corresponding cap on use of methyl bromide by non-critical uses. In the U.S., use of methyl bromide for critical uses is limited through an allowance system that limits the supply of methyl bromide for these uses. Therefore, methyl bromide use for critical uses will not exceed the critical use exemption level.

The commenter states that non-critical uses should not have any access to methyl bromide whatsoever. EPA understands that the commenter disagrees with EPA's approach of allowing non-critical users to have access to methyl bromide after 2005, which is a separate issue and one that the Agency previously addressed in the framework rule. The Agency has not typically banned the use of Class I ozone-depleting substances at the same time as production and import but rather has allowed use of these substances to decline gradually over a period of time as the supply diminishes. This approach was taken, for example, in the phaseout of chlorofluorocarbons (CFCs) and halons, two powerful ozone depleting substances. A period of continued use of previously produced or imported quantities generally helps to ensure a smooth transition to alternatives. This same approach has been taken by the Agency in the phaseout of methyl bromide, with one narrow exception: a partial restriction on access to stocks for critical uses as a condition of new production. The issue of not affecting a ban on all non-exempt uses has been addressed by the Agency in the framework rule and briefs filed by the government in *NRDC vs. EPA*, D.C. Cir No. 04-1438. EPA refers the public to the response to comment document for the framework rule and the briefs that are available in E-docket OAR-2004-0560.

Fumigations may already have occurred in 2005 for uses that today's final rule are determining, for the first time, to be critical. In fact, since the control period is close to ending, that is the likely case. At the time the fumigations occurred, however, the uses did not qualify as approved critical uses, and thus any methyl bromide used in those fumigations did not count against the total critical use exemption level. As of **[insert date of December 9, 2005]** these uses may now qualify for the critical use exemption. Based on the architecture of the exemption program as set forth in the framework rule, these uses are no different, for example, than uses that may be non-critical at one point during the control period and critical at a later point due to reaching of a local township cap on the use of methyl bromide alternatives. Therefore, EPA is treating these uses consistently with the Agency's treatment under 40 CFR 82.4(p)(2)(vi) of uses affected by the reaching of a local township cap. Again, the question of whether non-critical uses should be able to use methyl bromide after the date when the U.S. was obligated to cease production and import of the chemical is a separate issue and one previously addressed in the framework rule.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 [58 FR 51735, (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a “significant regulatory action” within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions will be documented in the public record.

This final action will likely have a minor cost savings associated with its implementation, but the Agency did not conduct a formal analysis of savings given that such an analysis would have resulted in negligible savings. This action represents the authorization of only 2.5 percent of the 1991 consumption baseline of methyl bromide to be made available for critical uses.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2179.03. This rule supplements the rule published in the Federal

Register on December 23, 2004 (69 FR 76982). The information collection under this rule is authorized under Sections 603(b), 603(d) and 614(b) of the Clean Air Act (CAA).

The mandatory reporting requirements included in this rule are intended to:

- 1) Satisfy U.S. obligations under The Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol), to report data under Article 7;
- 2) Fulfill statutory obligations under Section 603(b) of the Clean Air Act Amendments of 1990 (CAAA) for reporting and monitoring;
- 3) Provide information to report to Congress on the production, use and consumption of class I controlled substances as statutorily required in Section 603(d) of the CAAA.

In this rule, EPA is amending the reporting and recordkeeping Requirements in 40 CFR part 82 to require that entities report the amount of pre-phaseout methyl bromide inventory, held for sale or for transfer to another entity, to the Agency on an annual basis. Pre-phaseout refers to inventories of methyl bromide produced or imported prior to January 1, 2005. This additional requirement will allow EPA to track the drawdown of pre-phaseout inventories. The additional burden associated with the new recordkeeping and reporting requirements is summarized in the table below.

Collection Activity	Number of respondents	Total number of responses	Hours per response	Total hours
Rule Familiarization	54	54	.5	27
Data Compilation (annual basis)	54	54	.5	27
Data Reporting (annual basis)	54	54	.5	27
Total Burden Hours	-	162	-	81

EPA informs respondents that they may assert claims of business confidentiality for any of the information they submit. Information claimed confidential will be treated in accordance with the procedures for handling information claimed as confidential under 40 CFR Part 2, Subpart B, and will be disclosed only to the extent, and by means of the procedures, set forth in that subpart. If no claim of confidentiality is asserted when the information is received by EPA, it may be made available to the public without further notice to the respondents (40 CFR 2.203).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information; process and maintain information; disclose and provide information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business that is identified by the North American Industry Classification System (NAICS) Code in the Table below; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Category	NAICS Code	SIC Code	NAICS Small business size standard (in number of employees or millions of dollars)
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Agricultural Production	1112-Vegetable and Melon farming 1114-Greenhouse, Nursery, and Floriculture Production	0171-Berry 0171-Berry Crops 0181-Ornamental Floriculture and Nursery products	\$0.75 million
Storage Uses	115114-Postharvest crop activities (except Cotton Ginning) 493110-General Warehousing and Storage 493130-Farm product Warehousing Storage	4221-Farm Product Warehousing and Storage 4225-General Warehousing and Storage	\$21.5 million

Agricultural producers of minor crops and entities that store agricultural commodities are categories of affected entities that contain small entities. This rule only affects entities that applied to EPA for a de-regulatory exemption. In most cases, EPA received aggregated requests for exemptions from industry consortia. On the exemption application, EPA asked consortia to describe the number and size distribution of entities their application covered. Based on the data provided, EPA estimates that 3,218 entities petitioned EPA for an exemption. Since many applicants did not provide information on the distribution of sizes of entities covered in their applications, EPA estimated that between one-fourth and one-third of the entities may be small businesses based on the definition given above. In addition, other categories of affected entities do not contain small businesses based on the above description.

After considering the economic impacts of today's rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this rule are primarily agricultural entities, producers, importers, and distributors of methyl bromide, as well as any entities holding inventory of methyl bromide.

In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." (5 U.S.C. §§ 603- 604). Thus, an Agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves a regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Since this rule will make additional methyl bromide available for approved critical uses after the phaseout date of January 1, 2005, this is a de-regulatory action which will confer a benefit to users of methyl bromide. EPA believes the estimated de-regulatory value for users of methyl bromide is between \$20 million to \$30 million annually, as a result of the entire critical use exemption program over its projected duration. We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed

and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's rule creates a record-keeping and reporting burden on the private sector that is estimated to be under \$200,000 on an annual basis. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. Further, EPA has determined that this rule contains no regulatory requirements that might

significantly or uniquely affect small governments because it does not create any requirements on any State, local, or tribal government.

E. Executive Order No. 13132: Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today’s rule is expected to primarily affect producers, suppliers, importers and exporters and users of methyl bromide. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order No. 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order No. 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This final rule does not have tribal implications, as specified in Executive Order No. 13175. Today’s final rule does not

significantly or uniquely affect the communities of Indian tribal governments. The final rule does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order No. 13175 does not apply to this final rule.

G. Executive Order No. 13045: Protection of Children from Environmental Health & Safety Risks

Executive Order No. 13045: “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under Section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order No. 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This rule is not a “significant energy action” as defined in Executive Order No. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the

supply, distribution, or use of energy. This rule does not pertain to any segment of the energy production economy nor does it regulate any manner of energy use. Therefore, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law. No. 104-113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after

it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective on **[insert date of December 9, 2005]**.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedures, Air pollution control, Chemicals, Exports, Imports, Ozone, Production, Reporting and recordkeeping requirements, and Treaties.

Dated: _____

Stephen L. Johnson, Administrator

40 CFR Part 82 is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671-7671q.

2. Section 82.4 is amended by revising paragraph (p)(2)(vi) to read as follows:

§ 82.4 Prohibitions for class I controlled substances

* * * * *

(p) * * *

(2) * * *

(vi) No person who purchases critical use methyl bromide during the control period shall use that methyl bromide on a field or structure for which that person has used non-critical use methyl bromide for the same use (as defined in Columns A and B of Appendix L) in the same control period, excepting methyl bromide used under the quarantine and pre-shipment exemption, unless, subsequent to that person's use of the non-critical use methyl bromide, that person becomes subject to a prohibition on the use of methyl bromide alternatives due to the reaching of a local township limit described in Appendix L of this part, or becomes an approved critical user as a result of rulemaking.

* * * * *

3. Section 82.8 is amended by revising paragraph (c)(2) to read as follows:

§ **82.8 Grant of essential use allowances and critical use allowances.**

(c) * * *

(2) Allocated critical stock allowances granted for specified control period. The following companies are allocated critical stock allowances for 2005 on a pro-rata basis in relation to the stocks held by each.

Company

Albemarle	J.C. Ehrlich Co.

Ameribrom, Inc.	Pacific Ag
Bill Clark Pest Control, Inc.	Pest Fog Sales Corporation
Blair Soil Fumigation	ProSource One
Burnside Services, Inc.	Reddick Fumigants
Cardinal Professional Products	Royster-Clark, Inc.
Carolina Eastern, Inc.	Southern State Cooperative, Inc.
Degesch America, Inc.	Trical, Inc.
Dodson Bros.	Trident Agricultural Products
Great Lakes Chemical Corporation	UAP Southeast (NC)
Harvey Fertilizer and Gas	UAP Southeast (SC)
Helena Chemical Co.	Univar

Hendrix and Dail	Vanguard Fumigation Co.
Hy Yield Bromine	Western Fumigation
Industrial Fumigation Company	TOTAL 1,893,879 KILOGRAMS

4. Section 82.13 is amended as follows:

- a. By revising paragraphs (f)(3) introductory text, (f)(3)(xvii) and (f)(3)(xviii).
- b. By revising paragraph (g)(4) introductory text.
- c. By adding paragraph (g)(4)(xix).
- d. By revising paragraph (bb)(2)(iv) and adding paragraph (b)(2)(v).
- e. By revising paragraph (cc)(2)(iv) and adding paragraph (cc)(2)(v).
- f. By revising paragraph (dd).

§ 82.13 Recordkeeping and Reporting Requirements for class I controlled substances.

* * * * *

(f) * * *

(3) Reporting Requirements - Producers. For each quarter, except as specified below, each producer of a class I controlled substance must provide the Administrator with a report containing the following information:

* * * * *

(xvii) A list of the quantities of class I, Group VI controlled substances produced by the producer and exported by the producer and/or by other U.S. companies in that control period, solely to satisfy the critical uses authorized by the Parties for that control period; and

(xviii) On an annual basis, the amount of methyl bromide produced or imported prior to the January 1, 2005, phaseout date owned by the reporting entity, as well as quantities held by the reporting entity on behalf of another entity, specifying the name of the entity on whose behalf the material is held.

(g) * * *

(4) Reporting Requirements - Importers. For each quarter, except as specified below, every importer of a class I controlled substance (including importers of used, recycled or reclaimed controlled substances) must submit to the Administrator a report containing the following information:

* * * * *

(xix) Importers shall report annually the amount of methyl bromide produced or imported prior to the January 1, 2005, phaseout date owned by the reporting entity, as well as quantities held by the reporting entity on behalf of another entity, specifying the name of the entity on whose behalf the material is held.

* * * * *

(bb) * * *

(2) * * *

(iv) The number of unexpended and expended critical stock allowances;

(v) The amount of methyl bromide produced or imported prior to the January 1, 2005, phaseout date owned by the reporting entity, as well as quantities held by the reporting entity on behalf of another entity, specifying the name of the entity on whose behalf the material is held.

* * * * *

(cc) * * *

(2) * * *

(iv) The number of unexpended and expended critical stock allowances;

(v) The amount of methyl bromide produced or imported prior to the January 1, 2005 phaseout date owned by the reporting entity, as well as quantities held by the reporting entity on behalf of another entity, specifying the name of the entity on whose behalf the material is held.

(dd) Every approved critical user purchasing an amount of critical use methyl bromide or purchasing fumigation services with critical use methyl bromide must, for each request, identify the use as a critical use and certify that it is an approved critical user. The approved critical user certification will state, in part: "I certify, under penalty of law, that I am an approved critical user and I will use this quantity of methyl bromide for an approved critical use. My action conforms to the requirements associated with the critical use exemption published in 40 CFR part 82. I am aware that any agricultural commodity within a treatment chamber, facility, or field I fumigate with critical use methyl bromide cannot subsequently or concurrently be fumigated with non-critical use methyl bromide during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity). I will not use this quantity of methyl bromide for a treatment chamber, facility, or field that I previously fumigated with non-critical use methyl bromide purchased during the same control period, excepting a QPS treatment or a treatment for a different use (e.g., a different crop or commodity),

unless a local township limit now prevents me from using methyl bromide alternatives or I have now become an approved critical user as a result of rulemaking.” The certification will also indicate the type of critical use methyl bromide purchased, the location of the treatment, the crop or commodity treated, the quantity of critical use methyl bromide purchased, and the acreage/square footage treated, and will be signed and dated by the approved critical user.

5. Appendix L is revised to read as follows:

Appendix L to Subpart A Of Part 82—Approved Critical Uses, and Limiting Critical Conditions for Those Uses for the 2005 Control Period

Column A	Column B	Column C
Approved Critical Uses	Approved Critical User and Location of Use	Limiting Critical Conditions
PRE-PLANT USES		
Cucurbits	(a) Michigan growers	With a reasonable expectation that moderate to severe fungal pathogen infestation either already exists or could occur without methyl bromide fumigation.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers	With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation either already exists or could occur without methyl bromide fumigation.
Eggplant	(a) Georgia growers	With a reasonable expectation that moderate to severe yellow or purple nutsedge infestation either already exists or could occur without methyl bromide fumigation .

	(b) Florida growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or karst topography.
	(c) Michigan Growers	With a reasonable expectation that moderate to severe fungal pathogen infestation either already exists or could occur without methyl bromide fumigation.
Forest Seedlings	(a) Members of the Southern Forest Nursery Management Cooperative limited to growing locations in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(b) International Paper and its	With a reasonable expectation that one

	<p>subsidiaries limited to growing locations in Alabama, Arkansas, Georgia, South Carolina, and Texas</p>	<p>or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p>
	<p>(c) Weyerhaeuser Company and its subsidiaries limited to growing locations in Alabama, Arkansas, North Carolina, South Carolina, Oregon, and Washington</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p>
	<p>(d) Public (government-owned) seedling nurseries in the states of California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia, and Wisconsin</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.</p>

	(e) Members of the Nursery Technology Cooperative limited to growing locations in Oregon and Washington	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
	(f) Michigan seedling nurseries	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or moderate to severe disease infestation.
Ginger	Hawaii growers	With a reasonable expectation that moderate to severe bacterial wilt infestation either already exists or could occur without methyl bromide fumigation.
Orchard Nursery Seedlings	(a) Members of the Western Raspberry Nursery Consortium limited to growing locations in	With a reasonable expectation that one or more of the following limiting critical conditions either already exists

	<p>California and Washington</p> <p>(Driscoll's raspberries and their contract growers in California and Washington)</p>	<p>or could occur without methyl bromide fumigation: moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits on this alternative have been reached.</p>
	<p>(b) Members of the California Association of Nurserymen- Deciduous Fruit and Nut Tree Growers</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe nematode infestation, medium to heavy clay soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits on this alternative have been reached..</p>
	<p>(c) Members of the California Association of Nurserymen- Citrus and Avocado Growers</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe nematode infestation, medium to heavy</p>

		<p>clay soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits on this alternative have been reached..</p>
<p>Orchard Replant</p>	<p>(a) California stone fruit growers</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: replanted (non-virgin) orchard soils to prevent orchard replant disease, medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.</p>
	<p>(b) California table and raisin grape growers</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: replanted (non-virgin) orchard soils to prevent orchard replant disease, medium to heavy soils, or a prohibition on the use of 1,3-</p>

		dichloropropene products because local township limits for this alternative have been reached.
	(c) California walnut growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: replanted (non-virgin) orchard soils to prevent orchard replant disease, medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(d) California almond growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: replanted (non-virgin) orchard soils to prevent orchard replant disease, medium to heavy soils, or a prohibition on the use of 1,3-dichloropropene products because local

		township limits for this alternative have been reached.
Ornamentals	(a) Yoder Brothers Inc. in Florida	For use in all chrysanthemum production.
	(b) California rose nurseries	With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
	(c) California Cut Flower Commission growers and Florida growers	With a reasonable expectation that the user may be prohibited from using 1,3-dichloropropene products because local township limits for this alternative have been reached.
Peppers	(a) California growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe disease infestation, moderate to severe yellow or purple nutsedge infestation, or a prohibition on the use of 1,3-

		dichloropropene products because local township limits for this alternative have been reached.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee and Virginia growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less
	(c) Florida growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or karst topography
	(d) Michigan growers	With a reasonable expectation that moderate to severe fungal pathogen infestation either already exists or could

		occur without methyl bromide fumigation.
Strawberry Nurseries	(a) California growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe black root rot or crown rot, or moderate to severe yellow or purple nutsedge infestation.
	(b) North Carolina and Tennessee growers	With a reasonable expectation that the use will occur in the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less
Strawberry Fruit	(a) California growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe black root rot or crown rot, moderate to severe yellow or purple nutsedge

		infestation, a prohibition on the use of 1,3-dichloropropene products because local township limits for this alternative have been reached, or time to transition to an alternative
	(b) Florida growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge, or karst topography
	(c) Alabama, Arkansas, Georgia, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, and Virginia growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less
Sweet Potatoes	California growers	With a reasonable expectation that the user may be prohibited from using 1,3-

		dichloropropene products because local township limits for this alternative have been reached.
Tomatoes	(a) Michigan growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe disease infestation, or fungal pathogen infestation.
	(b) Alabama, Arkansas, Georgia, North Carolina, South Carolina, Tennessee, and Virginia growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or the presence of an occupied structure within 100 feet of a grower's field the size of 100 acres or less.
	(c) Florida growers	With a reasonable expectation that one or more of the following limiting critical conditions either already exists

		or could occur without methyl bromide fumigation: moderate to severe yellow or purple nutsedge infestation, or karst topography.
	(d) California growers in San Diego and Ventura counties	With a reasonable expectation that moderate to severe pest pressure exists and where alternatives are ineffective because of hilly terrain.
Turfgrass	(a) U.S. turfgrass sod nursery producers who are members of Turfgrass Producers International (TPI).	For the production of industry-certified pure sod.
	(b) U.S. golf courses	For establishing sod in the construction of new golf courses or the renovation of putting greens, tees, and fairways.
POST-HARVEST USES		
Food Processing	(a) Rice millers in all locations in the U.S. who are members of the USA Rice Millers Association.	With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that cannot be properly sealed to use an alternative to methyl

		bromide, the presence of sensitive electronic equipment subject to corrosivity, or time to transition to an alternative.
	(b) Pet food manufacturing facilities in the U.S. who are active members of the Pet Food Institute. (For today's rule, "pet food" refers to domestic dog and cat food).	With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that cannot be properly sealed to use an alternative to methyl bromide, the presence of sensitive electronic equipment subject to corrosivity, or time to transition to an alternative.
	(c) Kraft Foods in the U.S.	With a reasonable expectation that one or more of the following limiting critical conditions exists: older structures that cannot be properly sealed to use an alternative to methyl bromide, the presence of sensitive electronic equipment subject to corrosivity, or time to transition to an alternative.

	<p>(d) Members of the North American Millers' Association in the U.S.</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: older structures that cannot be properly sealed to use an alternative to methyl bromide, the presence of sensitive electronic equipment subject to corrosivity, or time to transition to an alternative.</p>
	<p>(e) Members of the National Pest Management Association (associated with dry commodity structure fumigation (cocoa) and dry commodity fumigation (processed food, herbs, spices, and dried milk))</p>	<p>With a reasonable expectation that one or more of the following limiting critical conditions either already exists or could occur without methyl bromide fumigation: older structures that cannot be properly sealed in order to use an alternative to methyl bromide, the presence of electronic equipment that is subject to corrosivity, where heat treatment would cause rancidity to a particular commodity, or time to transition to an alternative is needed.</p>

Commodity Storage	(a) Gwaltney of Smithfield in the U.S	For smokehouse ham curing facilities owned by the company.
	(b) Dry cured pork products: Members of the National Country Ham Association	Pork product facilities who are members of the Association.
	(c) Dry cured pork products: Members of the American Association of Meat Processors	Pork product facilities who are members of the Association.
	(d) Dry cured pork products: Nahunta Pork Center	For facilities owned by the company.
	(e) California entities storing walnuts, beans, dried plums, figs, raisins, and pistachios in California	With a reasonable expectation that one or more of the following limiting critical conditions exists: rapid fumigation is required to meet a critical market window, such as during the holiday season; when a buyer provides short (2 days or less) notification for a purchase; or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives
	(f) Growers and packers who	With a reasonable expectation that one

	<p>are members of the California Date Commission, whose facilities are located in Riverside County</p>	<p>or more of the following limiting critical conditions exists: rapid fumigation is required to meet a critical market window, such as during the holiday season, when a buyer provides short (2 days or less) notification for a purchase, or there is a short period after harvest in which to fumigate and there is limited silo availability for using alternatives.</p>
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